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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 20

JAMES CLIFTON HAWKINS,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE PETITIONER

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August 19, 1958.

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OPINION BELOW

The opinion of the Court of Appeals (R. 56-58)* is reported at 249 F. 2d 735.

JURISDICTION

The judgment of the Court of Appeals was entered November 9, 1957 (R. 59). A petition for a writ of cer-

*R. refers to transcript of record and the number following the page therein.

tiorari was filed December 9, 1957, and was granted January 20, 1958. The jurisdiction of this Court rests in 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED

1. Whether it was error to permit the Petitioner's wife to testify as a Government witness against Petitioner over the objection of Petitioner.

2. Whether the testimony of Petitioner's wife was prejudicial to Petitioner.

STATUTE AND RULE INVOLVED

The statutes and rules involved are: Act of June 25, 1948, c. 645, Sec. 1, 62 Stat. 846, amended Act of May 24, 1949, c. 139, Sec. 60, 63 Stat. 98, 18 U. S. C. 3772; *Federal Rules of Criminal Procedure, Rule 26;* Act of May 24, 1949, c. 139, Sec. 110, 63 Stat. 108, 28 U. S. C. Sec. 2111; and *Federal Rules of Criminal Procedure, Rule 52(a).* They are printed in Appendix A, infra, pages 39 and 40.

STATEMENT

On October 2, 1956, the Petitioner was found guilty of having on or about November 23, 1955, knowingly transported Lola Faye Moudy in interstate commerce from Mena, Arkansas to Tulsa, Oklahoma, in the Northern Judicial District of Oklahoma, for immoral purposes (R. 2), and was so adjudged guilty and committed to custody for imprisonment for five (5) years (R. 3).

Omitting that part of the evidence offered to establish the interstate transportation, which was never questioned in the trial, the remaining evidence may be summarized as follows:

The girl transported, Lola Faye Moudy, for the Government, testified that she had worked in a beer tavern in Dogpatch, Oklahoma, near Petitioner's dance hall (R. 7-8); in November she made a trip to Tulsa with Petitioner (R. 7), telling Petitioner that she wanted to find a better job, make money, and Petitioner asked if she wanted to go to Tulsa and work with Jane Wilson (R. 8); that she understood that she was supposed to work in a hotel as a prostitute (R. 9); that upon arriving in Tulsa, Petitioner made a phone call and Jane Wilson and Tommie came down in about half an hour (R. 12-13); that she went to the Corona Hotel (R. 13), did not register there and stayed in the room with Jane (R. 14); that Tommie arched her eyebrows and went to her own room (R. 14); that Jane told her how to act, how much to charge for dates, what kind of dates they (sic) was (R. 14); that she registered in another hotel and engaged in prostitution (R. 14-15); that after being arrested, she went to another hotel and continued prostitution (R. 16); thereafter, she went with Jane and Tommie from Tulsa to Ft. Smith, Arkansas and there met Petitioner (R. 17-19); that she went from there to Hot Springs, spent the night with Petitioner, and went to a motel to work (R. 20); then changed her mind and returned to her home (R. 21); that she gave the name of Johnnie McGuire in registering in the hotel in Tulsa and

that Petitioner thought it up (R. 21); and that while she was in Tulsa, she received a telephone call from the Petitioner asking how she was getting along (R. 27).

Tommie Alexander, for the Government, testified that she was staying at the Corona Hotel during November, 1955, and met a person named Johnnie at the hotel (R. 29), first meeting her at a service station at about 3:00 or 4:00 o'clock in the morning (R. 29-30), going to the service station with Jane Wilson (R. 30) when Johnnie got out of a light colored Cadillac car with a man in it and got into Jane's car and they returned to the hotel (R. 31); that she was a prostitute during November, 1955 (R. 32); that at the hotel she arched Johnnie's eyebrows (R. 32); that she left Tulsa with Johnnie and Jane in Jane's car and went to Ft. Smith (R. 32-33) and there she rented a hotel room and saw Johnnie McGuire the last time (R. 33).

Harold Smith, for the Government, testified that during November, 1955, he worked at Corona Hotel as clerk and porter (R. 33-34); that he knew Jane Wilson and Tommie Alexander and knew them to be prostitutes and that they stayed at such hotel during November, 1955 (R. 34); that Jane and Tommie left the hotel early one morning in November and came back with a girl named Johnnie (R. 35) who didn't check in but visited those girls and that Jane had received a telephone call prior to leaving that morning (R. 36).

L. V. Moudy, for the Government, testified only to facts corroborating interstate transportation.

Sherman Holloman, for the Government, testified only to facts corroborating interstate transportation.

Roy Hunt, for the Government, testified he was manager of Bliss Hotel during November, 1955, and had and identified an original registration card of a guest, Johnnie McGuire registering November 24, 1955, and checking out November 27 (R. 43) and that he didn't know if Johnnie McGuire was a man or woman (R. 44).

Erma Lane Hawkins, for the Government, testified that she was the wife of Petitioner and had been since July 5, 1954; that she and Petitioner were separated; that she had used the name Jane Wilson during November, 1955; that she was a prostitute during November, 1955; that she was a prostitute before she met Petitioner (R. 40-42); and, on cross examination, that she did not engage in prostitution during time she lived with Petitioner; that he didn't know that she engaged in prostitution; and that she was separated from Petitioner in November, 1955 (R. 42).

James Clifton Hawkins, for the Petitioner, testified that Lola Moudy asked him if he could get her a job several times (R. 46); that Petitioner told her, he had business in Oklahoma City and that she could ride to Tulsa, might could work there and that he would contact his ex-wife (sic) for her (R. 46); that he and ex-wife (sic) had never lived together much and he didn't know what her business in Tulsa was (R. 46); that he had never discussed getting the young lady a job of prostitution (R. 46); that his purpose in going to Oklahoma City was to pick up a deed from

Ralph Nichols and that he did get the deed (R. 47); and, on cross examination, that he had received money from Mrs. Jane Hawkins (R. 50), and, on redirect, that such money was repayment of money she had taken from cash register (R. 51).

George Ralph Nichols, for the Petitioner, testified that in November, 1955, Petitioner had made in Oklahoma City a final payment on some property and he had given a deed to Petitioner (R. 52).

Erma Lane Hawkins, for the Petitioner, testified that she took money from cash register when she left and that was for what Petitioner received money from her (R. 54).

The Petitioner appealed on the ground that the trial court erred in permitting his wife to testify on behalf of the Government over the objection of the Petitioner (R. 1). The Court of Appeals for the Tenth Circuit affirmed the judgment of conviction, stating that it was committed to the view that a wife is a competent witness to give testimony against her husband on the trial of a criminal case in which he is charged with a crime (R. 57) and that, if such were error, the testimony which the Government elicited from her was harmless (R. 58).

SUMMARY OF ARGUMENT

Prior to 1933 the common law rule was that one spouse was incompetent to testify *for* or *against* the other spouse in the trial of a criminal case. The *reason* for the incompetency of one spouse to testify *for* the other was founded on

her *interest* in the case. The *reason* for the incompetency of one spouse to testify *against* the other was founded upon the desire to preserve domestic tranquillity and hold inviolate the confidences between husband and wife.

In 1933 the Supreme Court noted that the trend for 50 years had been toward allowing person with an interest to testify and that almost all the disqualification based on interest, was that of one spouse to testify for the other, had long since been abolished. The Supreme Court then, in the light of modern reason and experience removed this disqualification, thus allowing one spouse to testify for the other, but leaving untouched the rule of incompetency of one spouse to testify *against* the other.

In 1935 the Tenth Circuit Court inferred that likewise the trend was toward the abolition of the rule rendering incompetent one spouse to testify *against* the other, and advocated that it be abolished.

Whereupon Petitioner reviewed the American jurisdictions which review revealed that no such trend exists, but on the contrary showed that in only thirteen of fifty-two such jurisdictions reviewed, could one spouse be compelled to testify against the other in the trial of a criminal case.

The testimony of Petitioner's wife alone inferred that he had knowledge that his wife was a prostitute and was the person who received the girl transported in interstate commerce. Such testimony is a strong inference as to Petitioner's purpose and intent in such transportation, and had a substantial influence in the jury's determination of guilt.

The calling by the Government of Petitioner's wife, who would be privileged from testifying, to be sworn, was prejudicial to him in view of the inference that the failure to produce evidence by a witness infers that such witness' testimony is unfavorable to the accused. To rule that such calling, in itself, is not error would cause confusion in trials because of the record being encumbered by irrelevant testimony received under the "harmless error" rule.

To rule that such calling was error would prevent technical errors in that the overt act of such calling cannot be misinterpreted and would promote orderly procedure of trials.

ARGUMENT

I.

A Wife is Incompetent to Testify Against Her Husband on a Trial of a Criminal Case Wherein He Is the Accused.

The question here presented is of grave importance, because the opinion of the lower court in the case at bar stands alone, in an attempt to abolish a rule of long standing. The Tenth Circuit Court is the first and only United States Appellate Court to hold that a wife is competent to testify against her husband in the trial of a criminal case where he is the accused.

This Court cites as its only authority *Yoder v. U. S., 80 F. 2d 665 (10th Cir. 1935)*. This Court recognizing the *Yoder case* as its authority, simply saying: "* * * and we

are content to follow that case (Yoder) without any effort to amplify or elucidate further its undergirding philosophy." (R. 57.)

Since the Court gave no further reason for its decision, it can only be assumed that it adopted as its reasoning that of the Court in the *Yoder case*. A look at the *Yoder case* quickly reveals that the competency of the wife to testify against her husband was not before the Court, for in that case they were divorced at the time of the trial, which rendered the wife competent under the common law. In the *Yoder case*, the Tenth Circuit Court declared that, like her incompetency to testify *in her husband's behalf*, as decided in *Funk v. U. S., 290 U. S. 371*, a wife's incompetency to testify *against* him had become obsolete and should be abolished.

It follows then that the question which is now before this Court, concerning the competency of a wife to testify *against* her husband, is precisely the question which was before the court in *Funk v. U. S.*, supra, concerning the competency of the wife to testify *for* her husband, i.e., has the reasoning upon which the rule was established become obsolete to the point that it should be abolished?

The *Funk case* will be discussed more fully later in this brief, but suffice it to say at this point, that the Court in that case was prompted to remove the common law of incompetency of a wife to testify for her husband, mainly on the maxim that "No rule of common law could survive the reason on which it was founded." If then the common

law rule as to the competency of a wife to testify *for* her husband and the rule as to the competency of a wife to testify *against* her husband, were both founded upon the same reason the rule adopted in the *Funk case* should have decided both.

Such is not the case, however, as was recognized by the Court in the *Funk case*, quoting from the opinion of Mr. Justice Southerland, the opening statement which begins at page 373.

> "The sole inquiry to be made in this case is whether in a federal court the wife of the defendant on trial for a criminal offense is a competent witness in his behalf. *Her competency to testify against him is not involved.*"

A brief review of the history of each of these rules quickly reveals that not only were they not based on common reason, but were of different origin. *Geddis, Blackstone, Vol. 1, Chap. 15, note 443, page 347 (1):*

> "In criminal prosecution it is true that the wife may be indicted and punished separately, for the union is only a civil union, but in trials of any sort they are not allowed to be evidence for or against each other, partly because it is impossible for their testimony to be indifferent, but principally upon the unions of persons and therefore if they were admitted to be the witness *for* each other they would contradict one maxim of the law 'nemo in propria causa testis esse debet' and if *against* each other they would contradict another maxim 'nemo tenetur seipsum accussare'. (Emphasis added.)
>
> "* * * The best reason for not allowing a husband or wife to be expressly *against* each other is that if the wife is a witness *for* her husband she would be under

a strong temptation to commit perjury and if *against* her husband it would be contrary to the policy of the marriage and might create much domestic dissension and unhappiness so vice versa the husband." (Emphasis added.)

From the earliest history of our government the rules of common law, except as modified by the court, have prohibited the wife from giving testimony which would incriminate her husband. The rule is well stated in the early case of *John F. Stein v. William Bowman, 38 U. S. 209, 10 L. Ed. 129*, the Court in its opinion at page 221 said:

"In the case of *The Kind v. Cliviger*, 2 Tom. 268, the court held that a wife should not be called in any case to give evidence even tending to criminate her husband. Mr. Justice Gross in that case observed 'in all the books which treat of evidence there are certain technical rules laid down which are highly beneficial to the public and ought not to be departed from. Some of these relate to husband and wife, and we find the general rule as to them to be founded *not on ground of interest but of policy*, by which it is established that a wife shall not be called to give testimony in any degree to criminate her husband. And Lord Holt says that she shall not be called indirectly to criminate him. And the rule seems to have governed all decisions from that time to the present." (Emphasis added.)

This case, being in the nature of a civil case, we are not so much concerned with the facts as with the rule of law as recognized by the court. Quoting from the opinion as to the facts which are material to our point in question, the court at page 220 says:

"The Plaintiff having read the deposition of Frances Stuffle, Deceased, in evidence the Defendant called the wife of the deceased to prove, as stated in the bill of

exceptions, that her husband had been bribed by John Rist to give evidence in that case and also to prove that he had frequently told her that he knew nothing of the Plaintiff or of Nicholas Stone, deceased. The plaintiff objected to the swearing of the witness but the court overruled the objection and permitted the witness to give testimony. To this opinion the Plaintiff excepted."

It will be noted that in this case the wife was called upon to give two types of testimony, firstly, she was called upon to testify as to the participating of her husband in the commission of a crime, and, secondly, she was called upon to divulge matters which he had told her, yet the court in its opinion made no apparent distinction and in its ultimate decision excluded the testimony, both types, apparently recognizing that they were both founded upon the same principle. The Court further said, at page 222:

"The law does not seem to be entirely settled how far in a collateral case a wife may be examined on matters in which her husband may be eventually interested. Nor, whether in such a case she may not be asked questions as to facts that may in some measure tend to criminate her husband but which afford no foundation for prosecution. The decisions which have been made upon these points seem to have been influenced by the circumstances of each case and they are somewhat contradictory. It is, however, admitted in all the cases that the wife is not competent except in cases of violence upon her person directly to criminate her husband; or to disclose that which she has learned from him in their confidential relationship.

"Some colour is found in some of the elementary works for the suggestion that this rule being founded upon the confidential relations of the parties will protect either from the necessity of disclosure; but will not prohibit either from voluntarily making any dis-

closure of any matters received in confidence and the wife and the husband have been viewed in this respect as having a right to protection from a disclosure on the same principle as an attorney is protected from the disclosure of a fact communicated to him by his client.

"The rule which protects an attorney in such case is founded on public policy and may be essential to the administration of justice. But this privilege is the privilege of the client and not of the attorney. The rule which protects the domestic relations from exposure rests upon considerations connected with the peace of the families."

and at page 223:

"In the present case the witness was called to discredit her husband; to prove in fact that he had committed perjury; and the establishment of the fact depended on his own confessions. Confessions which if ever made were made under confidence that subsists between husband and wife. It is true that the husband was dead, but this does not weaken the principle. Indeed, it would seem rather to increase than lessen the force of the rule.

"Can the wife under such circumstances either voluntarily be permitted, or by force of authority, be compelled to state facts in evidence which render infamous the character of her husband. We think most clearly that she cannot be. Public policy and established principles forbid it.

"This rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations which constitute the basis of civil society; and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To breakdown or impair the

> great principles which protect the sanctities of husband and wife would be to destroy the best solace of human existence."

At page 223, the Court concluded:

> "We think the court erred in overruling the objections to this witness."

From the authorities just cited it is clear that the incompetency of the wife to testify *for* her husband and the incompetency of the wife to testify *against* her husband are two separate and distinct rules and are each founded upon separate principles of reason.

The rule as to the incompetency of the wife to testify *for* her husband was based on her interest in the case, while the rule as to the incompetency of the wife to testify *against* her husband was based on preserving domestic tranquillity and holding inviolate the relationship between man and wife.

Having thus developed that each of these rules, though often stated together prior to the *Funk case*, are based on separate reasons, it should not be necessary to look back of *Graves v. U. S., 150 U. S. 118*, decided by the Supreme Court November 6, 1893. In the case at bar quoting from the opinion of Chief Justice Bratton (R. 56-57):

> "With certain exceptions which have no bearing here, it was the general rule at common law that neither husband nor wife were competent to testify as a witness for or against the other in any case, civil or criminal; and for a long time that rule was consistently iterated, reiterated and applied in the United States courts. *Stein v. Bowman*, 13 Pet. 209, 221;

Lucas v. Brooks, 18 Wall. 436, 452; *Stickme v. Stickme*, 131 U. S. 227; *Graves v. U. S.*, 150 U. S. 118; *Hendricks v. U. S.*, 219 U. S. 79, 91; *Jin Fuey Moy v. U. S.*, 254 U. S. 189."

The *Graves case* thus stands as the last utterance by the Supreme Court as to the incompetency of a wife to testify *against* her husband. The wisdom of the common law rule that a wife was not competent to testify either for or against her husband, as reiterated by the Supreme Court in the *Graves case*, was not seriously challenged until the Supreme Court decided *Funk v. U. S., 290 U. S. 371*, in December 1933.

In the *Funk case*, however, as was pointed out above, only the rule as to the incompetency of the wife to testify *for* her husband was involved.

In the *Funk case*, the Petitioner was twice tried and convicted in Federal District Court upon indictment for conspiracy to violate the prohibition law. His conviction on the first trial was reversed by the Circuit Court of Appeals on the ground not material here. *46 F. 2d 417*. Upon the second trial, as upon the first, defendant called his wife to testify in his behalf. At both trials she was excluded upon the ground of incompetency. The Circuit Court of Appeals sustained this ruling upon the first appeal and also upon the appeal which followed in the second trial. *66 F. 2d 70*. Error was predicated on the failure of the court to allow the wife to testify in behalf of her husband, thus a direct attack was made on the rule rendering a wife to be incompetent to testify *for* her husband because of her

interest in the case. The Supreme Court then, in an exhaustive review of the history and reasons upon which rested the laws of competency of witness, noted changes which had been brought about partially by legislation and partially by judicial construction.

The Court in its opinion, at page 376, quoted from the opinion in *Benson v. U. S., 146 U. S. 325, 13 S. Ct. 60, 36 L. Ed. 991*, the following:

> "Indeed the theory of the common law was to admit to the witness stand only those presumable honest appreciating the sanctity of an oath unaffected as a party by the result and free from any temptations of interest. The courts were afraid to trust the intelligence of jurors. *But the last 50 years have wrought a change in these respects and today the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witnesses those matters which heretofore rules sufficient to justify his exclusion.*" (Emphasis added.)

At page 380:

> "*The rules of the common law which disqualified as witnesses persons having an interest long since in the main have been abolished*, both in England and in this country; and what was once regarded as sufficient ground for excluding the testimony of such persons altogether has come to be uniformly and more sensibly regarded as affecting the credit of the witness only. Whatever was the danger that an interested witness would not speak the truth—and the danger never was as great as claimed—its affect has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors and perhaps other circumstances. The modern rule which has removed the disqualification from persons accused

> of crime gradually came into force after the middle of the last century and it is today universally accepted. The exclusion of the husband or wife is said by this Court to be based upon his or her interest in the event. *Jin Fuey Moy v. U. S.*, supra, and whether by this is meant a practical interest in the result of the prosecution or merely a sentimental interest because of marital relationship makes little difference. In either case a refusal to permit a wife, upon the ground of interest, to testify in behalf of her husband, while permitting him, who has the greater interest, to testify for himself, presents a manifest incongruity." (Emphasis added.)

The Court having thus concluded that because of legislation, judicial decisions and other changes brought about by modern experience, the reason upon which this rule was based no longer existed and said on page 386 of the *Benson case:*

> "It results from the foregoing that the decision of the court below in holding the wife incompetent is erroneous."

At this point there was established a new rule, rendering competent the testimony of the wife in behalf of her husband, but leaving untouched and as yet unchallenged, the rule rendering a wife incompetent to testify *against* her husband. As was pointed out earlier in this brief, the problem which confronts this case concerning the common law rule which renders incompetent the wife to testify *against* her husband is precisely the question which was before the *Funk case* concerning the competency of the wife to testify *for* her husband, .ie., as the reason upon which this rule was based, become obsolete to the point that it should be abolished?

Can it be said that the reason upon which the rule rendering incompetent the testimony of a wife *against* her husband, i.e., to preserve domestic tranquillity, no longer exists? Are these reasons not just as important now as ever?

Yoder v. U. S., 80 F. 2d 665, was decided by the Tenth Circuit Court of Appeals in 1935, two years after the decision in the *Funk case*. This was the first attack by a Federal Appellate Court upon the common law rule rendering the wife incompetent to testify *against* her husband. In this case, Roy Yoder was convicted of transporting a female in interstate commerce for immoral purposes. The only principle of error assigned, to be here considered, may be taken from the opinion, at page 667, to-wit:

> "1. One concerns the admissibility against Yoder of Testimony of his divorced wife. Yoder testified that he and Mrs. Young left for Chicago for his home and that both of them talked to Yoder's wife about the trip. In rebuttal the Government called Mrs. Yoder, who divorced Yoder after the Chicago trip and before the trial, and over seasonable objection and exception she testified that she was not at home the day her husband and Mrs. Young left for Chicago; that she was in Seminole; that she did not know Mrs. Young; that when she returned from Seminole she found a note from her husband written on a large cardboard that he had gone to Blackwell; that after the divorce Yoder asked her to corroborate his testimony by false swearing.
>
> "We are of the opinion that this testimony was rightly admitted. Until 1933 spouses were incompetent witnesses in criminal cases in Federal courts. But in that year, in *Funk v. U. S.*, 290 U. S. 371, the subject

of evidence in criminal cases was exhaustively reviewed and the Court held that the rules of evidence were not restricted to local rules in force at the time of the admission into the union of the state where the trial took place but were governed by common law principles as interpreted by the Federal courts in the light of reason and experience. It was there held that a wife is a competent witness for her husband. Whether she is a competent witness against him was reserved, and has not been authoritatively decided.

"* * * A wife is now competent to testify for her husband; the question still remains, may she testify against him? In this case she was divorced when she testified and there may well be a distinction on that ground. We prefer, however, to rest our decision on the underlying question whether a wife is incompetent as a witness when called by the prosecution."

The Court in its opinion thereafter set out a brief summation or analysis of some state statutes, citing Dean Wigmore in 1923, Sec. 488, which the Petitioner does not feel constrained to set out in this brief, since a recent and exhaustive study of all the states have been made and will be set out in this brief later.

The Court then continued, saying at page 668:

"These statutes and the decisions of many courts which might be cited indicate a clear and decided trend toward removing the bar of incompetency from witnesses as such; *that we are moving steddily in the direction of allowing the trier of the facts to hear all of the evidence, the interest or the relationship of the witness to the party being given due consideration in weighing its value.* The trend is in the right direction for we can see no reason why Mrs. Yoder should not testify that she was in Seminole and not in Shawnee on a certain day and that she did not know Mrs.

Young; nor can we see any reason why Yoder, who testified to the contrary, should have the privilege of excluding her testimony." (Emphasis added.)

"(2). Her testimony of communication between her and Yoder after the divorce are not privileged because they were not husband and wife. Mrs. Yoder's testimony however did not stop there. She testified as to a written communication between her and her husband during their marriage. Competency of this testimony involves very different considerations from those concerning her competency as a witness. *The wisdom of the common law rules that held inviolate the confidence of a penitent and his priest, a patient in his physician, a client in his lawyer and a husband in his wife, has stood the test through time.* The statutes of 42 jurisdictions provide that private communication between husband and wife are incompetent evidence and in 26 of these it is expressly provided that they are incompetent during marriage and afterward. Such is the rule in the Federal courts. *Hopkins v. Grimshaw*, 165 U. S. 342, 17 S. Ct. 401, 41 L. Ed. 739." (Emphasis added.)

Two things of particular significance must be here pointed out. (1) The quote from the Court expressing the reason for their decision on this point, taken from page 668 of the *Yoder case*,

> *"That we are moving steadily in the direction of allowing the trier of the facts to her all the evidence, the interest or relationship of the witness to the party being given due consideration in weighing its value."*

is exactly what prompted the Court in the *Funk case*, in dealing with the wife as a witness *for* her husband, wherein interest was the reason for the incompetency. There the Court found that the trend was toward allowing interested testimony and considering the interest only in determining

the weight to be given the testimony. But it must be pointed out that such has not been the trend toward the rule here in question, which was based upon the reason of preserving domestic tranquillity. For to admit such testimony at all is to violate the reason upon which the rule rests, not withstanding what weight would be given it by a "trier of the facts."

The second significant point which must be noted from the opinion, is the apparent approval of the common law of incompetency of one spouse to testify as to confidential communication received during marriage, as is made evident on page 668 of the *Yoder case* wherein the Court said:

> *"The wisdom of the common law rules that held inviolate the confidence of a penitent in his priest, a patient in his physician, a client in his lawyer, and a husband in his wife, has stood the test of time."*

The position of the Court seems then to be inconsistent for it has been shown that both the common law rule, as to the incompetency of one spouse to testify as to confidential communication received during marriage, and the incompetency of the wife to testify against her husband, are both founded upon the same reason, i.e., to preserve domestic tranquillity and hold inviolate the relationship between man and wife.

The Petitioner submits then, that to recognize the wisdom of the one, is to confirm the wisdom of the other.

After the decision in the *Funk case* and just two months prior to the decision in the *Yoder case*, the Third Circuit decided *Paul v. U. S., 79 F. 2d 561.* In this case, two

defendants were jointly indicted, one was Paul, the other was Mrs. Reid, the wife of Norman Castle Reid. The evidence showed that the Reids, though still married, had been separated for four or five years. The defendants were charged with forgery and with uttering a forged instrument. The instrument involved in this case was a government check payable to the order of Norman Castle Reid. The question in this case was who endorsed the check. The evidence showed that both Paul and Mrs. Reid participated in the cashing of the check, and Mrs. Reid testified that the endorsement was that of her husband. He was called as a witness for the Government and he testified that he had not endorsed the check. On the trial, Mrs. Reid was acquitted on both counts and Paul was acquitted of forgery but convicted of uttering a forged instrument. Error was urged in permitting Norman Castle Reid to testify, over objection, *against* his wife and Paul. The Court said at page 563,

> "At common law the rule is well settled that a husband was not allowed to testify for or against his wife and in Pennsylvania this rule has been followed ever since the case of *Commonwealth v. Manson*, 1 Ashem. (Pa. 31). This rule has been followed in the Federal courts until recently when it was relaxed in an exhaustive opinion by Mr. Justice Southerland to permit a wife to testify for her husband, *John S. Funk v. U. S.*, 290 U. S. 371, 548 S. Ct. 212, 78 L. Ed. 369, 93 ALR 1136; but this rule has not been so relaxed as to permit a husband to testify against his wife. The rule extends to testimony in which the wife is being jointly tried with a co-defendant. *United States v. Liddy* (D. C.), 2 F. 2d 60. The learned court accordingly fell into error in permitting Norman Castle Reid

to testify against his wife and Paul. His testimony was very damaging, for without it there was no evidence whatever that his name had been forged."

Brunner v. U. S., 168 F. 2d 281, was decided in 1948 in the Sixth Circuit. Here the defendant was convicted of fraud in obtaining a registered letter and for abstracting and removing $40.00 from the letter. The wife was permitted to testify *against* the husband. The Court in its opinion discussed the history of the common law rule, cited the *Funk case*, cited *Rule 26, Federal Rules of Criminal Procedure*, which grew out of the *Funk case*, and then said at page 283:

> "But in 1893, or forty years before the *Funk* case, the Supreme Court said in *Graves v. United States*, 150 U. S. 118, 121, 14 S. Ct. 40, 37 L. Ed. 1021 (a criminal case), that the wife was not a competent witness against her husband. See also *United States v. Jones* (D. C.), 32 Fed. 569, and in *Paul v. United States*, 3 cir., 79 Fed. 2d 561, 563, the Court held that it was error to permit the husband to testify against his wife and another indicted with her."

The Court then recognized the decision in the *Yoder case*, and commented upon the conflicting opinion of the two Circuit Courts in the *Paul* and *Yoder cases*, and disposed of the question by saying, at page 283:

> "Our view is that we must accept the opinion of the Supreme Court in the Graves case as a correct interpretation of the law. It may be that 'in the light of reason and experience' the Supreme Court will find it desirable to remove the incompetency of a wife as a witness in a criminal case against her husband, but it has not yet done so."

The last case to be decided on this point was the *United States v. Walker, 176 F. 2d 564*, decided by the Second Circuit Court July 29, 1949. Here the defendant was convicted of transporting sums of money taken feloniously by fraud and with intent to steal and purloin. The evidence showed that the defendant persuaded a woman to go through a marriage ceremony with him, pretending to marry her. Later he managed to get money from her and transported it from Texas to New York. The evidence further revealed that the defendant had done the same thing to at least two other women, previously. However, the first victim actually became his wife and was at the time of the trial, even though she had filed for a divorce. The defendant's wife was permitted to testify over the objection of the defendant. The Court in deciding this case said at pages 567, 568:

> "The fifth and last alleged error was the admission of the testimony of the defendant's wife, Clara Duerr Walker. Nobody disputes that, although there were some exceptions, at common-law a wife's testimony against her husband was incompetent. The only question is whether that doctrine has been changed; and, if not, whether the case at bar is within any exception. In deciding this we must bear in mind two distinct principles: (1) the incompetency of either spouse to testify against the other; (2) the incompetence of either spouse to testify to confidential communications made during marriage. Clara Duerr Walker testified to what the defendant said to her, while courting her before their marriage on June 8, 1945; and she also testified to what he told her thereafter, which,

provided it was 'confidential,' was incompetent on any theory, and indeed would have been even after a divorce. Although no part of what he told her after marriage can be considered as a confidential communication except a letter which he sent her on March 24, 1947, that was, not only 'confidential', but extremely damaging. He had shipped her off to live in Alaska, and had left her substantially without money; he had gone through the form of marrying two other women meanwhile, and he was still living with the second of these, preparing to fleece her, as he had fleeced her predecessors. Surely nothing was better calculated to arouse the detestation of the jury than the letter, with its protestations of continued love and its assurances that he was only awaiting the opportunity to be reunited with her. We should find it extremely difficult to write off the admission of this letter as 'harmless error' under Rule 52(a), even in a case where the guilt of the accused was so incontestably proved as here. It is true that, when it was offered, the defendant said that he had no objection to its receipt but that must be read in conjunction with his objection at the outset to any testimony whatever of this witness. His assent to the letter only meant that he had no specific objection to it as distinct from his general objection to any of her testimony.

"We need not say, however, whether we should have held that its admission was alone enough to compel a reversal of the judgment, because we hold that no part of the testimony of the witness was admissible anyway; and that for that reason the judgment cannot stand. In Yoder v. United States the Tenth Circuit declared that, like her incompetence to testify in her husband's behalf, a wife's incompetence to testify against him had become obsolete and should be abolished; but they did not have to decide the point, because the wife had in fact been divorced, and that made her testimony competent under the old law. A few months later the Third Circuit held the contrary

of this dictum, and the Sixth Circuit made the same ruling only a year ago. Thus, the question is still open in point of authority. It is always a debatable question how far any relevant evidence should be privileged. It deprives the party against whom the privilege is invoked of access to the truth; and in a disclosure of the whole truth should be the prime concern of a court of justice. Whether in a given situation the interest of the privileged party in suppressing the truth, ought to outweigh that concern would seem to be a matter for Congress, and not for the courts. Moreover, unlike the spouse's disqualification as such this conflict of interest is by no means one-sided, because, although it is not very usual for it to arise unless the spouses are estranged, not all estrangements are final, and nothing could more dispose the privileged spouse to treasure enmity and to repulse any overtures of reconciliation than the memory of what will ordinarily rankle as treachery. Nor is it either practicable or desirable to make the decision dependent upon the judge's conclusion that in the instance before him the marriage has already been so far wrecked that there is nothing to save. That was true, no doubt, here; but we must look beyond the case before us. The question will always arise in the progress of the trial; it must be decided at once; and its answer will introduce a collateral inquiry likely to complicate the trial seriously. The common-law avoided such an inquiry by taking divorce as the only test; and, while the privilege persists at all, there is every reason so to limit the exception. We conclude, therefore that we should await the choice of Congress between the conflicting involved, or such an overwhelming general acceptance by the states of abolition of the privilege, as induced the Supreme Court to action in Funk v. United States, supra."

Recognizing from both the *Funk case* and the *Walker case* the importance of noting how other jurisdictions have treated the rule here in question, a review was made of all

the forty-eight states, the District of Columbia, Phillipine Islands, Alaska and Hawaii.[1]

Bearing in mind what prompted the Court in the *Funk case* to abolish the rule of incompetency of one spouse to testify *for* the other, was their finding that because legislative changes and judicial construction revealed that the trend was toward the abilition of all rules rendering incom-

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[1] *Code of Alabama* 1940, Title 15, Sec. 311 (5639); *Alaska Rev. Stat.* 1934, Sec. 4309; *Arizona Revised Statutes Annotated Criminal Code*, Vol. 5, Sec. 13-1802; *Arkansas Statutes* 1947, Title 43, Sec. 2019; *California Code of Civil Procedure*, Sec. 1881; *Colorado Revised Statutes* 1953; Chap. 153, Art. 1, Sec. 7; *General Statutes of Connecticut*, Revision of 1949, Chap. 429, Sec. 8800; *Delaware Code*, Sec. 3502 (1953); *District of Columbia Code*, 1951 Edition, Title 14, Sec. 306; *Florida Statutes* 1957, Chap. 90, Sec. 04(90.04); *Georgia Code Annotated*, Book 13A, Title 38, Sec. 1604; *Hawaii Revised Laws* 1925, Sec. 2615, *Hawaii Revised Laws* 1935, Sec. 3823; 4 *Idaho Code*, Chap. 30, Sec. 19-3002; *People v. Pelumbo*, 5 Illinois 2d 409, 125 N. E. 2d 518 (1955); 2 (Part 1) *Burns Indiana Statutes*, Chap. 16, Sec. 9-1602, 9-1603, 2-1714; Vol. II, *Code of Iowa*, Sec. 622.7; *General Statutes of Kansas* (1949), Chap. 62, Art. 1420; *Kentucky Revised Statutes*, 1953, Chap. 421, Sec. 210 (421.210), Subsec.1; 2 *Louisiana Revised Statutes* 1950, Title 15, Chap. 1, Sec. 461; 4 *Revised Statutes of Maine* 1954, Chap. 148, Sec. 22; 2 *Annotated Code of Maryland* 1951, Art. 35, Sec. 4; 8 *Annotated Laws of Massachusetts*, Chap. 233, Sec. 20; *Compiled Laws of Michigan* 1948, Chap. 617, Sec. 67; 2 *Minnesota Statutes* 1953, Chap. 595, Sec. 02; 2 *Mississippi Code*, 1942, Chap. 8, Sec. 1689; *Missouri Revised Statutes* 1949, Chap. 546, Sec. 260 (546.260); *Revised Codes of Montana*, 1947, Annotated, Vol. 8, Title 94 (94-8802); 2 *Revised Statutes Nebraska* 1943, Chap. 25, Sec. 1203; 1 *Nevada Rev. Stat.*, Title 4, Chap. 48, Sec. 040(48.040); 5 *N. H. Rev. Stat.* 1955, Chap. 516, Sec. 27; *Revised New Jersey Statutes*, 1953, Title 2A, Chap. 81, Sec. 3 (2A:81-3); 6 *New Mexico Statutes* 1953, Chap. 41, Art. 12, Sec. 20; 7 *New York Consolidated Law Service* 1951, *Penal Law Part IV*, Art. 218, Sec. 2445; 1 B *General Statutes of North Carolina* 1953, Division II, Chap. 8, Art. 57; 3 *North Dakota Revised Code* of 1943, Title 31, Chap. 31-01, Sec. 02 (31-0102); *Ohio Revised Code* 1953, Chap. 2317; *Oklahoma Statutes* 1951, Title 22, Sec. 702; 1 *Oregon Revised Statutes*, Title 14, Chap. 139, Sec. 320 (139-320); *Purdon's Pennsylvania Statutes*, Title 19, Sec. 683; *Phillipine Island Penal Code* 1911, *Gen. Order 58* of 1900, Sec. 58; *General Laws of Rhode Island* (1956), Vol. 2, Title 9, Chap. 17, Sec. 13; 3 *Code of Laws of South Carolina* 1952, Title 26, Sec. 403 (26-403); 2 *South Dakota Code of 1939*, Title 36, Chap. 01 (36.01), Sec. 01 (36.0101); *Tennessee Code Annotated*, Vol. 5, Title 24, Sec. 103; *Texas Revised Code of Crim. Proc.* 1925, Art. 714; *Constitution of Utah*, Art. I, Sec. 12; *Vermont Statutes*, Rev. of 1947, Chap. 84, Art. 1738; 2 *Code of Virginia* 1950, Title 8, Sec. 288; 1 *Revised Code of Washington*, Title 5, Chap. 60 (5.60), Sec. 060 (5.60.060); 2 *West Virginia Code of 1955*, Chap. 57, Art. 3, Sec. 5728; *Wisconsin Statutes* 1951, Title 30, Chap. 325, Sec. 18 (325.18); *Wyoming Compiled Statutes of 1945*, Annotated, Vol. 1, Chap. 3, Sec. 2605.

petent testimony because of their interest in the case. Our review revealed the wisdom of that opinion, in that fifty-one of the fifty-two jurisdictions reviewed were in complete harmony with the decision, the State of Georgia alone, excepting.

No such overwhelming approval can be found in support of the abolition of the rule here under question. Of the fifty-two jurisdictions reviewed, in only thirteen, can one spouse be compelled to testify *against* the other in a criminal case.

Since the beginning, the common law rule has been recognized in Federal courts that one spouse is incompetent to testify against the other. This was reiterated in the *Graves case*, supra. Since the *Funk case*, four Federal Circuit Court decisions have been rendered on this rule. First came the *Paul case*, supra, then the *Yoder case*, supra, afterwards the *Brunner case*, supra and then came the *Walker case*. Only the Tenth Circuit which rendered the decision in the *Yoder case*, advocated the abolishment of this rule. All others have followed it.

Thus we have but one Circuit Court (Tenth Circuit in the *Yoder case*) and thirteen states which accord the decisions rendered in the case at bar, while all other jurisdictions refuse to disturb domestic tranquillity by allowing the prosecution to compel one spouse to testify against the other in a criminal case.

Can it be said that these few jurisdictions indicate the overwhelming trend in light of modern reason and experience.

Petitioner submits, in view of the authorities above cited, it was error to permit the Government to call as their witness Erma Lane Hawkins, wife of the defendant, over his objection.

II.

The Testimony Elicited by the Government from the Witness, Erma Lane Hawkins, Was Prejudicial to Petitioner and the Calling by the Government of Petitioner's Wife to be Sworn as a Witness Was Prejudicial to the Petitioner.

The testimony elicited from the wife of Petitioner testifying as a government witness and not otherwise in evidence was that she had used the name of Jane Wilson in November, 1955 (R. 41); that she was a prostitute at such time (R. 41); and had been a prostitute before meeting the Petitioner (R. 42). There was evidence that Jane Wilson was a prostitute (R. 34), but it was her testimony alone that made the Petitioner's wife a prostitute.

Without regard, for the present, that the evidence was given by the Petitioner's wife, the above testimony, of itself, incriminates Petitioner. Interstate transportation being admitted the only issue at trial was for what purpose. An intent and purpose on Petitioner's part that such purpose was immoral was an essential element of the offense. *Mortensen v. U. S., 322 U. S. 369; Dunn v. U. S., 190 F. 2d 496.* Such intent or purpose necessarily had to be shown by circumstantial evidence. *Lindsey v. U. S., 227 F. 2d 113.* Using Wigmore's chart of analysis in the case

at bar the Government offered testimonial assertions tending to show different circumstances that would infer the one proposition that Petitioner had the necessary intent or purpose. *1 Wigmore on Evidence, Third Edition, Sec. 25.* Without aid of testimonial assertions of wife the testimonial assertions offered by the Government may have sufficiently established the following relevant circumstances that (1) Petitioner and Lola Fay Moudy had conversation before interstate transportation, wherein Petitioner asked Lola Fay Moudy if she wanted to go to Tulsa and work with Jane (R. 8); (2) Petitioner made phone call in Tulsa and Jane and Tommie showed up (R. 13); (3) Lola Fay Moudy went with Jane and Tommie to hotel room where Jane advised her as to how to work as a prostitute (R. 13-14); (4) Lola Fay Moudy engaged in prostitution in Tulsa (R. 15); (5) after interstate transportation Lola Fay Moudy met Petitioner and went with him to Hot Springs to work as prostitute (R. 19-20); and, the testimonial assertions which were cumulative with testimonial assertions of wife may have sufficiently established the following relevant circumstances: that (6) working with Jane meant working as a prostitute (R. 9 and 41); (7) Jane was a prostitute (R. 34 and 41); and, the testimonial assertions offered by Government through Petitioner's wife alone may have sufficiently established the following relevant circumstances: that (8) Petitioner's wife was a prostitute (R. 41); (9) Petitioner's wife had been a prostitute before meeting Petitioner (R. 42); and, (10) Petitioner's wife was known as Jane Wilson. These last three circumstances asserted testimonially by the wife

alone could only have been offered to infer the proposition of the purpose, intent or motive of Petitioner. *1 Wigmore on Evidence, Third Edition, Sec. 216 at page 717.* If not, they could have been offered only to show bad character. Petitioner does not contend that the prosecution offered this evidence only to show bad character in view of this Court's power to notice such plain errors without assignment or specification. *United Brotherhood, Etc. v. U. S., 330 U. S. 395,* but Petitioner submits that such circumstances had probative effect upon the jury in determining the intent, motive and purpose of Petitioner in the interstate transportation and were prejudicial.

In *Krulewitch v. U. S., 336 U. S. 440,* testimony of an alleged co-conspirator of a purported conversation was received into evidence in violation of the hearsay rule and it was contended that the evidence was merely cumulative and should be held harmless. This Court recognizing that other evidence corroborated complaining witness on certain phases of the case, the jury had to choose between believing the complaining witness or the Petitioner as to the vital phases. This Court held there that such hearsay evidence was not harmless and to paraphrase the language of the Court at page 444, the Court could not say that the admission of the hearsay evidence "may not have been the weight that tipped the scale against Petitioner." So, in the case at bar, the circumstances that Petitioner's wife was known as Jane Wilson, and, was, and had been before meeting Petitioner, a prostitute would infer that *Petitioner* also knew that working with Jane meant working as a

prostitute, and such knowledge infer the purpose and intent of the interstate transportation. The jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference. See *Tot v. U. S., 319 U.S. 463, 467.* In the case at bar Petitioner testified that he did not have such knowledge and on the vital phase of the case, i.e., purpose, the jury had to choose, as in the *Krulewitch case*, supra, between believing the complaining witness and the petitioner.

The *Krulewitch case*, supra, and *Fiswick v. U. S., 329 U. S. 211*, a case involving similar inadmissible evidence reinforcing other evidence, follow the test set down in *Kotteakos v. U. S., 328 U. S. 750*, set out as follows:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. *Bruno v. U. S.*, supra, 308 U. S. at page 294, 60 S. Ct. at page 200. But if one cannot say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

and at page 762 U. S., at page 1246 S. Ct.:

> "In the final analysis judgment in each case must be influenced by conviction resulting from examination

> of the proceedings in their entirety, tempered but not governed in any rigid sense of stare decises by what has been done in similar situations, c.f. *United States v. Socony Oil Co.*, supra, 310 U. S. at pages 240-242, 60 S. Ct. at pages 852, 853. Necessarily, the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the ballot for decision on the case as a whole, are material factors in judgment."

and at page 763 U. S., at page 1247 S. Ct.:

> "Thus, it is not the appellate court's function to determine guilt or innocence. *Weiler v. U. S.*, supra, 323 U. S. at page 611, 65 S. Ct. at page 551; *Bollenback v. United States*, 326 U. S. 607, 613, 614, 66 S. Ct. 402, 405, 406. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole critera for a reversal or affirmanee. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error."

Petitioner submits that such evidence clearly had a substantial influence in establishing purpose or intent of the interstate transportation, or, at least, leaves one in grave doubt as to whether it had such influence. The admission of the wife's testimony in the present case can be likened to the admissions in the *Fiswick case*, supra, of a co-defendant, received in evidence against all defendants erroneously, and to borrow a phrase from such case at page 220 "* * * evidence which brought each petitioner into the circle was the only evidence which cemented them together in the illegal project." So, in the case at bar, the testimony

of the wife was the only testimony cementing Jane Wilson, a known prostitute, with the Petitioner in the illegal project. Petitioner submits that at least there is a grave doubt as to whether this cementing together was not a substantial influence in the jury's determination of purpose or intent in the interstate transportation.

Petitioner submits that the placing by the Government of a wife of a person charged with a crime on the witness stand is prejudicial. *8 Wigmore on Evidence, Third Edition, Sec. 2243 at page 267* reads as follows:

> "If the spouse against whom it is desired to be called the other as a witness takes advantage of the privilege and thus causes the rejection of the witness, how far may this circumstance be taken as permitting the *inference* that the excluded testimony would be *unfavorable* to the party spouse?
>
> "The established principle (ante, Sec. 286) permits such an inference ordinarily, for the supression of available testimony, or the failure to utilize it. Must it yield in this instance, as being inconsistent with the full exercise of the privilege? The question has usually been answered in the affirmative:"

and Sec. 2243, at page 271, reads as follows:

> "Whether this conclusion is inevitable is at least open to argument. The argument against it is that there is no actual coercion and no actual denial of the privilege, but merely a dilemma and an option, which are created, not by any direct attempt to break into the privilege, but by the accidental coincidence, upon the same piece of testimony, of two independent principles of law, neither one of which should be made to yield rather than the other. This argument is nearly

the same as that which applies to the privilege against self-crimination (Post Sec. 2272), and need not be further notice here."

AND Sec. 2268, at page 392, reads as follows:

> "*Accused.* For the *party defendant in a criminal case*, the privilege permits him to refuse *answering any question whatever in the cause*, on the general principle that it 'tends to criminate' (ante, Sec. 2260) (*a*). This being so, the prosecution could nevertheless on principle have a right at least to *call him to be sworn*, because, as with ordinary witness, it could not be known before hand whether he would exercise his privilege. But no court seems ever to have sanctioned this application of the principle. * * * This result may be rested on several considerations: * * *(3) Even though the prosecution may be entitled to that opportunity at the earlier stage, still the exercise of this technical right need hardly be conceded, since the procedure could only have, as its chief effect, the emphasizing of his refusal, should he refuse, and thus the indirect suggestion of that inference against him from which he is protected by another aspect of the principle. (*Post*, Sec. 2272)."

Also see *Graves v. U. S., 150 U. S. 118*, condemning the prosecution's commenting on the failure of the Defendant's wife to testify.

It appears according to Wigmore that calling a privileged witness, as the wife of an accused, to be sworn, and forcing the witness to elect not to testify, could only emphasize the refusal and infer that the testimony would be unfavorable to the accused. Petitioner submits that this is and should be the rule and that its application in the trial of criminal cases would be in harmony and not do violence to the "harmless error" rule.

Without such rule there could be a rule which permitted the Government to place a spouse of an accused on the witness stand and allow her to testify insofar as her testimony would not be prejudicial to the accused.

Though such might not encourage the production of irrelevant testimony, it would do nothing to discourage such testimony, which should be done to maintain the orderly procedure of criminal trials and to prevent the records from being burdened.

To follow such rule would not do violence to the "harmless error" rule in that such rule was intended to prevent reversal of convictions on matters technical but not substantive. *Kotteakos v. U. S., 328 U. S. 750.*

Here there could be no misinterpretation by the trial court as to whether evidence was hearsay, whether the law requires a particular instruction to the jury, whether the evidence was at variance with an indictment, or, whether the indictment is sufficient. The overt act of the prosecution in calling the spouse of an accused to be sworn as a witness is unequivocal and cannot be subject to interpretation. Such act would not have to be correlated with any evidence, pleading, procedure, or substantive law, but would stand alone as error and this Court would not be called upon as in the many "harmless error" cases, to review the evidence in this situation to determine if the spouse testified to matters prejudicial to accused.

Though no contention is made that the rights of the Government or accused should be governed by cost, there

can be no estimate of the time and expense required of this Court, the Courts below, and the litigants participating therein, could be made with any accuracy if Wigmore's rationale is not followed, though one could safely say it would be immeasurably great.

Petitioner submits that the common law rule rendering a spouse of an accused incompetent to testify against such accused charged with a criminal offense, and that the reason for such rule, and the continued existence of such reason, is still sound; that the testimony of the Petitioner's wife incriminated him in that such testimony strongly inferred his intent and purpose in the interstate transportation; and, that the calling of Petitioner's wife to be sworn was error, in itself, because of the inference, caused by her refusal, that her testimony would be unfavorable to Petitioner.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

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August 19, 1958.

APPENDIX A

Act of June 25, 1948, c. 645, Sec. 1, 62 Stat. 846, amended Act of May 24, 1949, c. 139, Sec. 60, 63 Stat. 98, 18 U. S. C. 3772.

"The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt in the United States district courts, in the district courts for the Territory of Alaska, the District of the Canal Zone and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, in the United States courts of appeals, and in the Supreme Court of the United States. This section shall not give the Supreme Court power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

"The right of appeal shall continue in those cases in which appeals are authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

"The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

"Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

Federal Rules of Criminal Procedure, Rule 26.

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

Act of May 24, 1949, c. 139, Sec. 110, 63 Stat. 108, 28 U. S. C., Sec. 2111.

"Harmless Error. On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Federal Rules of Criminal Procedure, Rule 52(a).

Harmless Error.

"Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."